No. 20766

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHPORT LAND & COMMERCIAL COMPANY,

Appellant

v.

STEWART UDALL, AS SECRETARY OF THE INTERIOR, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

# BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR



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# INDEX



## CITATIONS

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## OPINION BELOW

The opinion of the district court dismissing the iginal complaint in this case is reported at 244 F.Supp. 2 (N.D. Cal. 1965) (R. 25-29).

## JURISDICTION

The amended complaint alleged that the jurisdiction the district court was based upon R.S. sec. 2450, 43 U.S.C.

sec. 1161 et seq., and 28 U.S.C. secs. 1331 and 1361 (R. 6). The final order of the district court was entered on November 29, 1965, dismissing the cause of action as to the Secretary of the Interior (R. 40).[1/] The notice of appeal was filed by Southport on December 9, 1965 (Ibid.). This Court has jurisdiction under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. When the Secretary of the Interior is requested to make an equitable adjudication declaring the appellant entitled to a patent to certain public lands under the provisions of R.S. sec. 2450, 43 U.S.C. sec. 1161, and the Secretary concludes on the basis of admitted facts that he is precluded as a matter of law from issuing the requested patent, whether the Secretary is nevertheless compelled to hold a hearing before adjudication.

2. Whether the district court had jurisdiction to mandamus the Secretary of the Interior to issue appellant a patent under a statute which authorizes the Secretary "to

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1/ Certain parties who were also defendants in this case in the lower court and are defendants-appellees in the companion case, Southport Land & Commercial Co. v. Kosanke Sand Corp., et al., No. 20767, now pending in this Court, were mining claimants whose claims were filed in 1963 and 1964 on the subject land.

ecide upon principles of equity and justice" all cases of uspended entries of public lands and to adjudge in what cases atents shall issue upon the same.

3. Whether, assuming that the Secretary of the nterior cancelled a valuable interest in the public domain ithout a hearing in 1883, the appellant is precluded by imitations and laches from litigating in 1964 whether such ancellation unconstitutionally denied appellant a right in eal property without due process of law.

STATUTES INVOLVED

R.S. sec. 2347 provides:

> Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. (30 U.S.C. sec. 71.)

R.S. sec. 2348 provides:

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. (30 U.S.C. sec. 72.)

R.S. sec. 2349 provides:

All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; * * *. (30 U.S.C. sec. 73.)

R.S. sec. 2350 provides:

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association,

shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant. (30 U.S.C. sec. 74.)

Section 37 of the Act of February 25, 1920, 41 Stat. 61, provides:

That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. (30 U.S.C. sec. 193.)

R.S. sec. 2450 provides:

> The Commissioner of the General Land-Office is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the [Treasury,][Interior], the Attorney-General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land-claims, and to adjudge in what cases patents shall issue upon the same. (43 U.S.C. sec. 1161.)

STATEMENT

Southport Land & Commercial Company, hereafter referred to as "Southport," filed this suit against the Secretary of the Interior and Steve and Beverly Kosanke in the court below on May 15, 1964 (R. 1-5). The first count of the complaint alleged that Southport had been organized as a California corporation in 1861 under the name of Black Diamond Coal Mining Company, hereafter referred to as "Black Diamond." Black Diamond acquired by quitclaim deeds whatever right, title or interest the grantors had in the N ½ of Section 8, T. 1 N., R. 1 E., M.D. B. & M., paying approximately $100,000 for such interest. It was alleged that between 1861 and 1865 a total of 1,570,481 gross tons of coal was produced from the N ½ of Section 8 and immediately adjoining area (R. 2).

The complaint continued that Black Diamond filed
ish Coal Entry No. 13 on April 25, 1883, with $3,200. It
; alleged that the entry was filed as a result of the case
Mullen v. United States."[2/] It was alleged that the Com-
issioner of the General Land Office, by letter of May 7, 1883,
ncelled the application because of the appeal of the afore-
ntioned case to the Supreme Court. The complaint stated
at (R. 2-3) "After the decision by the Supreme Court in
id case, the Assistant Commissioner for the Department of
e Interior, General Land Office, Washington, D.C. in a
tter dated July 8, 1886, authorized the Black Diamond Coal
ning Company, plaintiff, to make entry, upon proper applica-
on, upon showing compliance with the laws regulating coal
nds and regulations established thereunder and fixing the
ice of the land at $20 per acre rather than $10 amounting
a total of $6,400 for the 320 acres contained in the North
of Section 8. No record exists of the filing of said ap-
lication and the submission of the $6,400 nor of the return
the $3,200 submitted."

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/ Mullan v. United States, 118 U.S. 271 (1886).

The complaint alleges that Southport has continued in possession during the entire period since 1886, paying state taxes and otherwise acting as if it were owner. Upon search of title subsequent to the issuance of an oil lease in 1961, the defect in legal title was discovered. As a result, Southport filed with the Bureau of Land Management a request for equitable adjudication of California Cash Coal Entry No. 13. The request was denied by a final decision dated January 15, 1964 (R. 4).

The second count of the complaint set out an independent cause of action against Beverly and Steve Kosanke under the law of the State of California, in which it was alleged that these defendants attempted to make placer and loc locations on the land involved in this case with full knowledge of Southport's rights in the land (R. 5). Since the appellee Secretary of the Interior is not concerned with this second count, it is not necessary to explore it further. This is the subject matter of case No. 20767, pending before this Court.

Insofar as the Secretary is concerned, the relief hich Southport requested was that (R. 5): "* * * this court ssue its mandatory order compelling the defendant STEWART UDALL o approve the issuance of a patent to plaintiff for the North of Section 8, T. 1 N., R. 1 E., M.D. B. & M."

The Secretary of the Interior filed a motion to ismiss on June 16, 1965. Pursuant to this motion and subequent arguments made and briefs filed before the district ourt, an order granting the motion to dismiss was entered on ugust 11, 1965 (R. 25-29). The order states in pertinent art as follows (R. 25-28):

> * * * The complaint alleges that this decision [of the Department of the Interior] was arbitrary, biased and contrary to law and fact. This conclusionary statement is apparently intended to conform to the requirement of part (e), 5 U.S.C. 1009, pertaining to the judicial review of agency action, and more specifically to the judicial scope of review. However, the relief afforded by that section is not in the nature of a mandatory court order which preempts final administrative determination. The court "shall (A) compel agency action unlawfully withheld or [un]reasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions . . ." [Emphasis by the court.] * * *

Therefore plaintiff does not ask the court to review that decision, rather he seeks a hearing de novo on the merits and prays for the issuance of a mandatory order compelling the defendant Udall to approve his application for a land patent, as an original matter. The statutory language is clear. It does not impart primary jurisdiction upon this court to determine the merits of land patent claims. 43 U.S.C. 1161 et seq.

The plaintiff would then have us find legislative sanction for this suit pursuant to 28 U.S.C. 1361 which provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. [Emphasis by the court.]

* * *

* * * Plaintiff does not contend that a proper application for a land patent was made with the government or that any administrative error was committed by the government in relation to the land patent claim. Therefore, plaintiff has not established any duty owing to him by the government as was the case in Adams, and which is an indispensible requirement of 28 U.S.C. 1361, supra. In the absence of such duty and in the absence of any statute compelling the government to issue a land patent as a matter of course upon application from a prospective purchaser, this court cannot arbitrarily take jurisdiction.

* * * * *

> Further, the court notes that plaintiff has not named the United States as a party defendant. In and of itself, that would be fatal to this complaint, since plaintiff would have defendant Udall sign the name of the United States to a deed conveying an interest in land. * * *

Thereafter Southport filed an amended complaint, hich alleges in its first cause of action the same factual aterial down to the filing of Cash Coal Entry No. 13 (R. 6-7). : then alleges (R. 7):

> Subsequently, the Commissioner of the General Land Office, by letter dated May 7, 1883, purported to cancel said entry without a hearing or prior notice to the Black Diamond Coal Mining Company. Said purported cancellation unconstitutionally deprived plaintiff's predecessor in interest of its valuable rights in and to said real property without due process of law and was void and without legal effect. Ever since said date the Commissioner of the General Land Office, and his successors, have failed and refused, and defendant STEWART UDALL does now fail and refuse to issue plaintiff or its predecessor in interest a patent by reason of said entry.

In its second cause of action, the same material re- ating to the acquisition of the purported title to the land is lleged as detailed above. After alleging the discovery of ne defect in its title in 1961, the complaint states (R. 8-9):

> On or about March 20, 1963, plaintiff filed with the Bureau of Land Management, Department of Interior, a request that it adjudge that plaintiff is entitled to a patent to said real property upon principles of justice and equity. Said request was denied by a decision dated January 15, 1964, approved by the Assistant Secretary of the Interior, which decision constituted the final administrative determination in this matter. Said decision was entered without a hearing in accordance with principles of justice and equity as required by 43 U.S.C. Section 1161 et seq., or any hearing whatsoever, and said decision was based upon secret reports, memoranda, and other evidence which defendant STEWART UDALL has refused, and does now refuse, to disclose to plaintiff and which plaintiff has had no opportunity to examine.
>
> * * * * *
>
> By reason of said failure to hold a hearing and use of secret documents, STEWART UDALL has failed and refused to exercise the discretion required of him under said statutes, and has acted unconstitutionally and ultra vires his authority.

The third, fourth, and fifth causes of action relate to the attempt of the Kosanke interests[3/] to locate mining clai on this property and will not be developed further here.

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3/ In the amended complaint, Steve Kosanke, Beverly Kosanke, H. E. Kosanke and Kosanke Sand Corporation were named as defendants.

The Secretary of the Interior filed a motion to dis-
; the amended complaint, which was granted by the district
it (R. 30-31). In its order of dismissal, the court con-
ied that neither the first nor second causes of action state
:s sufficient for a judicial review of the administrative
irs of the Secretary and that neither of the causes of action
:e a claim upon which relief could be granted against the
:etary, either individually or as an officer of the United
:es (R. 30). The present appeal is prosecuted from the
:r and judgment of dismissal of the amended complaint.

## SUMMARY OF ARGUMENT

### I

Appellant is not entitled to a hearing under R.S. sec.
). The first three points of Southport's appeal rest on the
ument that the district court should have ordered the Secre-
y of the Interior to hold an Administrative Procedure Act
e of hearing before disposing of Southport's request that it
entitled to a patent. Southport argues that, since R.S.
. 2450 "imposes an adjudicatory function upon the Secretary,"
s is a "case where a statute requires an adjudication to be
ermined on the record after opportunity for an agency hearing

* * *." But R.S. sec. 2450 does not require any hearing nor an adjudication to be determined "on the record after opportunity for an agency hearing."

The basic question is the nature of the equitable adjudication under R.S. sec. 2450. The decision of the Department of the Interior holds that as a matter of law the Secretar is without authority to grant a patent in this case. The purpo of the equitable adjudication as explained by the Supreme Court in Hawley v. Diller, 178 U.S. 476 (1900), is to authorize confirmation of entries where the law had been substantially complied with but because of some error or informality the land officers would be compelled to reject. The purpose was not to restrict the ordinary jurisdiction of land officers, but to supplement it by allowing them to apply principles of equity for saving entries from rejection or cancellation which were otherwise meritorious.

The decision of the Department of the Interior was not an adjudication on the merits of an irregular entry, but a decision that the Secretary was without authority under any

ircumstances to dispose of coal lands outside the provisions
f the Mineral Leasing Act of 1920, 41 Stat. 437. Section 37
f the Mineral Leasing Act of 1920 provides the only exception,
amely, "* * * valid claims existent on February 25, 1920, and
hereafter maintained in compliance with the laws under which
nitiated, which claims may be perfected under such laws, * * *."
he Department held that cancelled Coal Cash Entry No. 13 was
ot a "valid claim existent on February 25, 1920," since it
ad been cancelled in 1883 and never thereafter perfected.

We are concerned in this case with a coal lands entry
nd not a mining claim. These entries do not have a continuing
alidity by reason of discovery and continuous possession, as
mining claims. Instead, they are like entries on agricul-
ural lands, which must be perfected as specified in the public
nds laws or the entryman's rights are lost. Unless a valid
pplication to enter is pending, the coal entryman's possession
ves rise to no right worthy of recognition. To be entitled
a preferential right, the applicant must be in possession,
ve opened a coal mine on the land, and filed his statement

with the land office within 60 days of his actual possession or the date the lands are surveyed, whichever is later.

Since this case was disposed of as a matter of law on admitted facts, it is not necessary to decide whether a hearing in conformance with the Administrative Procedure Act is necessary. Even in judicial proceedings, the opportunity to be heard orally on questions of law is not an inherent element of procedural due process.

II

The appellant has failed to state a claim on which relief can be granted. Appellant's substantive claim is that the district court had jurisdiction to order the Secretary of the Interior to issue a patent in this case. The mandamus jurisdiction is conferred by 28 U.S.C. sec. 1361 to compel an officer of the United States to perform a duty owed to the plaintiff. The Tenth Circuit has recently pointed out, in considering this statute, that mandamus is an extraordinary remedy which may issue only when the claim is clear and certai and the duty of the officer ministerial, plainly defined, and peremptory. "The duty sought to be exercised must be a positiv

ommand and so plainly prescribed as to be free from doubt." nder the facts alleged in this case, there is no statute nich imposes a ministerial duty on the Secretary to issue outhport a patent. It is clear from the language of R.S. ec. 2450 that it does not impose a positive command but, on ne contrary, grants the Secretary an authority to issue atents which is discretionary. Therefore, the district court orrectly held that it had no power to control or influence ne judgment of an officer or to direct the performance of a iscretionary duty.

Cases cited by appellant, that in the proper case ne court may issue a writ of mandate directing the issue of patent, are immaterial, since the amended complaint does not llege facts sufficient to compel the issuance of a patent to outhport. Nor is it valid to argue that the present record ill not support an order compelling the issuance of a patent ecause appellant was precluded from a proper hearing before ne Secretary * * *." It is not a question of whether the ppellant has proved facts, but whether such facts have been

alleged in the complaint. It was assumed that all well-pleaded facts are correct when the complaint was dismissed.

III

Insofar as there might have been error in the 1883 General Land Office proceedings, this suit is barred by laches. It may be assumed, for purposes of testing the complaint, that Southport had, on May 7, 1883, a valuable interest in the public domain which the General Land Office cancelled without hearing or prior notice. It is the Secretary's position that appellant is barred by laches from litigating the unconstitutionality of this action 81 years later in 1964. There is a general statute of limitations of six years for bringing suit against the United States. Since the relief requested is that the Secretary of the Interior convey land, the legal title to which is now admittedly in the United States, the United States is a necessary party to this suit. Therefore, the suit is barred by the statute of limitations, laches and absence of consent by the United States to be sued.

## ARGUMENT

### I

### APPELLANT IS NOT ENTITLED TO A HEARING UNDER R.S. SEC. 2450

The first three points of Southport's appeal rest
:he argument that the district court should have ordered
e Secretary of the Interior to hold a hearing conforming to
e Administrative Procedure Act, 5 U.S.C. sec. 1004 et seq.,
ore disposing of Southport's request for a decision that
as entitled to a patent to the lands involved in this
e. In the first point of its brief, pp. 4-7, Southport
ues that it is obvious from the language of the statute,
S. sec. 2450, 43 U.S.C. sec. 1161, that "it imposes an ad-
.catory function upon the Secretary" (Br. 5). From this
ise Southport slides without further explanation into the
mption that this case is therefore one covered by 5 U.S.C.
. 1004: "In every case where a statute requires an ad-
.cation to be determined on the record after opportunity for
gency hearing * * *" (Br. 5). This is a glaring non
itur. There is nothing in the language of R.S. sec. 2450,
.S.C. sec. 1161, which requires any type of hearing, nor

does it require the adjudication to be determined "on the record after opportunity for an agency hearing." Southport candidly admits that it "has not been able to locate any decisions defining the type and scope of hearing required by Section 1161 * * *" (Br. 4).

The problem, however, is even more basic. Before it can be determined whether the Secretary is required to hold a hearing in conformance with the Administrative Procedure Act, the nature of the equitable adjudication in this case under R.S. sec. 2450, 43 U.S.C. sec. 1161, must be determined. The decision of the Department of the Interior, which is set out as an Appendix to this brief, holds that as a matter of law the Secretary of the Interior is without authority to grant a patent in this case. The purpose of R.S. sec. 2450, 43 U.S.C. sec. 1161, was explained by the Supreme Court in Hawley v. Dille 178 U.S. 476, 493 (1900):

> As carried into the Revised Statutes the purpose of this legislation is, where the law has been substantially complied with, to authorize the confirmation of entries which otherwise the land officers would be compelled to reject because of errors or informalities which, if satisfactorily explained as arising from ignorance, accident

> or mistake, would, in the absence of an adverse claim, be excused by the courts, in administering the principles of equity and justice. The purpose of the legislation was not to limit or restrict the general or ordinary jurisdiction of the land officers. It was rather to supplement that jurisdiction by authorizing them to apply the principles of equity, for the purpose of saving from rejection and cancellation a class of entries deemed meritorious by Congress, but which could not be sustained and carried to patent under existing land laws. There was no necessity for legislation authorizing the rejection or cancellation of irregular entries, but legislation was necessary to save such entries from rejection and cancellation when otherwise meritorious.

The decision of the Department of the Interior in

L case was not an adjudication as to the merit or lack of
[4/]
t of an irregular entry. Instead, it was a decision that
e Secretary of the Interior is without authority under any
umstances to dispose of coal lands belonging to the United
es outside the provisions of the Mineral Leasing Act of
, 41 Stat. 437, 30 U.S.C. sec. 181 et seq. Section 37 of

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We do not overlook the antepenultimate paragraph of the Interior decision which suggests an alternative ground for granting a patent, viz., that all the coal had been mined the land was no longer valuable for such deposits. However, was merely "an additional point * * * worthy of note," and the basis of the decision (App. 39 ).

the Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C. sec 193, provides the only exception where coal lands can be disposed of outside its provisions, namely, "* * * valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Therefore, the Secretary of the Interior disposed of this case not on the basis of any authority given in R.S. sec. 2450, 43 U. sec. 1161, but under Section 37 of the Mineral Leasing Act o 1920, supra, on the ground that the cancelled Coal Cash Entr No. 13 was not a "valid claim existent on February 25, 1920, since it had been cancelled in 1883 and never thereafter perfected. James F. Rapp, 60 I.D. 217 (1948). The Supreme Cou has made it clear in Work v. Braffet, 276 U.S. 560, 566 (192 that anything so insubstantial as a mere right to ask for an equitable adjudication under R.S. sec. 2450, 43 U.S.C. sec. 1161, on a stale entry, cancelled almost 40 years prior, cou not be considered a "valid claim existent on February 25, 19

It must be remembered that in this case we are concerned with a coal lands entry and not a mining claim. Coal lands entries do not have a continuing validity by reason of

iscovery and continuous possession as do mining claims.
stead, they are more like entries on agricultural lands,
ich must be perfected within the time specified by the
blic land laws or the entryman's rights are lost. As is
ated in II Lindley on Mines (3d ed.) sec. 509, pp. 1163-1164:

> It will be observed that the nature of the inchoate estate created by compliance with the coal laws bears a striking analogy to that conferred by the former agricultural pre-emption act. The same analogy exists as to proceedings to acquire the title.
>
> The only feature in common between the coal land system and the general mining laws is, that in both discovery is required as a condition precedent to the acquisition of title.
>
> * * * * *
>
> In the case of mining claims, certain prescribed work must be performed annually in order to perpetuate the estate acquired by location. A locator need never apply for a patent. Under the coal laws, no particular amount of expenditure is required, except where an association of not less than four persons seeks to enter six hundred and forty acres, it is required that they must produce proof of improvements to the extent of five thousand dollars. A patent must be applied for within a year from the filing of the declaratory statement, in case of preferential rights, under section twenty-three hundred and forty-eight of the Revised Statutes. In the case of private entries under section twenty-three hundred and forty-seven, the first step is the application for patent. [Emphasis supplied.]

Earlier in his treatise, Mr. Lindley states the steps necessary in connection with a private entry under Section 2347 of the Revised Statutes, 30 U.S.C. sec. 71, to obtain a patent. II Lindley on Mines (3d ed.) sec. 503, p. 1155. Here it is pointed out that "Until application is made to enter and purchase under this section, the claimant has no right which is worthy of recognition. His possession, if he has any, must yield to one who complies with the law and files upon the land."

The steps necessary to obtain a patent under Section 2348 of the Revised Statutes, 30 U.S.C. sec. 72, are outlined in II Lindley at Section 504, p. 1155. Two prerequisites are necessary for the preferential rights under this section: (1) the applicant must be in actual possession of the lands applied for; and (2) he must, prior to final entry, have opene and improved mines situated thereon. If the preferential righ is initiated upon surveyed lands, the claimant must present to the register of the proper land office, within 60 days after date of actual possession and commencement of improvements, hi declaratory statement of facts upon which he bases his right.

Lindley on Mines (3d ed.) sec. 505, p. 1158.[5/] Where the nds are unsurveyed, the declaratory statement is to be filed thin 60 days after the approved plat is received at the cal land office (Ibid.). Failure to file this instrument thin the time specified renders the land subject to entry another, if he has complied with the land laws, but, in the sence of an adverse claimant, the right to complete the entry not forfeited (Ibid.). After filing the declaratory state- nt, all persons claiming under Section 2348 of the Revised atutes have one year to prove their rights and pay for the nds filed upon. R.S. sec. 2350, 30 U.S.C. sec. 74. Failure pay for the land within the required period makes the land bject to entry by any other qualified applicant (Ibid.).

Since the case was disposed of as a matter of law on cts which are admitted, it is not necessary to decide whether hearing held in conformance with the Administrative Procedure t, supra, is necessary under either R.S. sec. 2450, 43 U.S.C. c. 1161, or Section 37 of the Mineral Leasing Act of 1920.

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5/ Under the mining location procedure, nothing was filed with the local office to secure possessory rights.

Clear Gravel Enterprises, Inc., 64 I.D. 210, 213 (1957). Ev in a judicial proceeding, the opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved. Dredge Corporation v. Penny, 338 F.2d 456, 462 (C.A. 9, 1964).

This is also the answer to Points II and III of th appellant's brief. In Point II it is argued that R.S. sec. 43 U.S.C. sec. 1161, imposes the duty on the Secretary to ma an adjudication, that the duty to hold a hearing before that adjudication is "statutory" and that the district court has jurisdiction to mandamus the Secretary to perform a statutor duty (Br. 8-9). Appellant does not specify which statute im poses the duty to hold the hearing before making the adjudica tion. We assume the reference is to the Administrative Pro- cedure Act. However, since the case may be disposed of as a matter of law on undisputed facts without a hearing, whether or not appellant's premises that the Administrative Procedure Act imposes a statutory duty to hold a hearing on disputed issues of fact are correct becomes immaterial. Point III is

rely a variation of the same argument. The Administrative ocedure Act, 5 U.S.C. sec. 1009(e), allows the district urt to "(A) compel agency action unlawfully withheld or un- asonably delayed." The brief continues (p. 10): "In the esent case appellant has alleged that the Secretary refused hold the hearing required by 43 U.S.C. Section 1161."[6/] erefore, appellant argues, the Administrative Procedure Act ovides for the issuance of a mandatory order directing the cretary to hold a hearing. But again, even assuming all of pellant's premises were correct, the district court will not der the Secretary to hold a hearing when none of the con- olling facts are in dispute.

Before leaving this point, we advert to footnote 6, pra, and again remind the Court that Southport did not allege at it requested an administrative hearing from the Department the Interior, nor does it unequivocally state in its brief

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6/ Appellant is not correct in stating that it alleged the Secretary "refused" to hold a hearing. In fact, its allegation was that the Secretary's decision "was entered without a aring in accordance with principles of justice and equity as quired by 43 U.S.C. Section 1161 et seq., or any hearing whatever, * * *" and that "By reason of said failure to hold a aring and use of secret documents, STEWART UDALL has failed d refused to exercise the discretion required of him under id statutes. * * *" [emphasis supplied] (R. 8-9).

that it requested such a hearing. Appellant is therefore precluded from raising for the first time in the district co the issue of whether it was entitled to a hearing under the Administrative Procedure Act. United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952).

This disposes of Southport's claim of error becaus of no hearing in the administrative proceedings. 7/ Let us examine its second argument before this Court.

II

THE APPELLANT HAS FAILED TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

Appellant's second claim of error, as set out in Point IV of its brief, is that the district court had jurisdiction to order the Secretary of the Interior to issue a pa in this case. Any mandamus jurisdiction which the district court had over the Secretary of the Interior is conferred by 28 U.S.C. sec. 1361, which provides that a district court ha jurisdiction "of any action in the nature of mandamus" to co

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7/ This case is completely distinguishable from the problems before this Court in Coleman, et al. v. United States, No. 20227 (June 21, 1966). Therefore, there is no occasion here to discuss what we believe to be the errors of the Coleman decision.

n officer of the United States to perform a duty owed to the laintiff. In discussing the scope of this statute, the Tenth ircuit said in Prairie Band of Pottawatomie Tribe of Indians v. dall, 355 F.2d 364, 367 (1966):

> Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. * * * The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. * * *

This is simply a succinct restatement of decades of ecisions concerning review of adjudications relating to public and matters. In the present case, under the facts as alleged n the complaint and amended complaint there is no statute hich imposes a ministerial duty on the Secretary to issue outhport a patent. Certainly, R.S. sec. 2450, 43 U.S.C. sec. 161, imposes no such duty which is "a positive command and so lainly prescribed as to be free from doubt." To the contrary, t is abundantly clear from its language that R.S. sec. 2450, 3 U.S.C. sec. 1161, grants the Secretary an authority which is ompletely discretionary. The Supreme Court indicates the

section is discretionary, when it says the purpose of the legi lation was not to limit or restrict the ordinary jurisdiction of the land officers, but to authorize them to confirm entries they would otherwise be compelled to reject. Hawley v. Diller 178 U.S. 476, 493 (1900). As to the ordinary broad powers of the Secretary of the Interior in lands matters, see Best v. Humboldt Mining Co., 371 U.S. 334, 336 et seq. (1963); Udall v Tallman, 380 U.S. 1 (1965); Boesche v. Udall, 373 U.S. 472 (1963). Appellant would also appear to hold the same view whe in paragraph VI of the second cause of action in the amended complaint, it was alleged (R. 9):

> By reason of said failure to hold a hearing and use of secret documents, STEWART UDALL has failed and refused to exercise the discretion required of him under said statutes * * *. [Emphasis supplied.]

The district court correctly held that it had no power to cont or influence the judgment of an officer or to direct the per- formance of a discretionary duty (R. 27). Smith v. United Sta 333 F.2d 70, 72 (C.A. 10, 1964), and cases cited there.

The case cited by appellant on pages 12 and 13 of it brief, to the effect that in the proper case the court may iss a writ of mandate directing the issuance of a patent, are

material. The question is whether the amended complaint leges facts sufficient to compel the issuance of a patent to uthport. The answer is that it does not and, as the decision the Department of the Interior holds, the Secretary has been thout authority to issue a patent in this case since bruary 25, 1920, regardless of the provisions of R.S. sec. 2450, U.S.C. sec. 1161. Moreover, since the issuance of a patent der the provisions of R.S. sec. 2450, 43 U.S.C. sec. 1161, is scretionary, rather than mandatory, the facts alleged in e amended complaint are not sufficient to compel the issuance a patent, even without the statutory prohibition of Section of the Mineral Leasing Act, 41 Stat. 451, as amended, 30 S.C. sec. 193.

Nor is it any answer that "Because appellant was pre-uded from a proper hearing before the Secretary, * * * it may that the record would not presently support such an order ompelling the issuance of a patent]" (Br. 15-16). Again, it not a question of whether appellant has proved facts suf-cient to compel the issuance of a patent, but whether such cts have been alleged in the amended complaint. When a com-aint is dismissed for failure to state a cause of action, it

is assumed that all well-pleaded facts are correct. Wyman v. Wyman, 109 F.2d 473, 474 (C.A. 9, 1940); Kohen v. H. S. Crock Company, 260 F.2d 790, 792 (C.A. 5, 1958). It is submitted t the amended complaint pleads no facts which compel the Secret of the Interior to issue him a patent. Under the present sta of the law, it is hard to conceive of facts which could be shown to change the result. Therefore, the district court wa correct in dismissing the complaint for failure to state a cause of action.

III

INSOFAR AS THERE MIGHT HAVE BEEN ERROR IN THE 1883 GENERAL LAND OFFICE PROCEEDINGS, THIS SUIT IS BARRED BY LACHES

In its amended complaint, Southport alleges that th letter of May 7, 1883, which "purported to cancel said entry without a hearing or prior notice," unconstitutionally depriv it of a right in real property without due process of law. W assume, for purposes of this argument, that the well-pleaded facts, but not the conclusions of law, are correct. Therefo we may assume that Southport had, on May 7, 1883, a valuable interest in the public domain which the General Land Office

ncelled without a hearing or prior notice. The question is
n raised whether Southport can come into court 81 years
er in 1964 and litigate over whether this action of the
eral Land Office unconstitutionally denied Southport a right
real property without due process of law. It is the Secre-
y's position that such litigation is barred by laches,
ecially in view of the intervening legislation by which
gress changed the whole process of administration and dis-
ition of federal coal lands. While there is no statute
limitations specifically applicable to the cancellation of
oal lands entry in 1883, the general statute of limitations
bringing suit against the United States in "every civil
ion" is six years.[8/] 28 U.S.C. sec. 2401(a). The statute
intended to apply to "every civil action" brought in a
ted States district court, which means all cases except a
minal or admiralty proceeding. Werner v. United States, 188
d 266, 268 (C.A. 9, 1951). Further, since the relief re-
sted in this case is that the Secretary of the Interior

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8/ The court's attention is also invited to the requirement of R.S. sec. 2350, 30 U.S.C. sec. 74, that all persons claiming er R.S. sec. 2348, 30 U.S.C. sec. 72, must prove their rights c pay for the land within one year from the time prescribed r filing their claims.

convey land, the legal title to which is now admittedly in the United States, to Southport, the United States is a necessary party to this suit. White v. Administrator of General Service Admin. of U.S., 343 F.2d 444 (C.A. 9, 1965). Therefore, insof as this suit is to force the Secretary of the Interior to conv land belonging to the United States, it is barred not only by laches but both by the statute of limitations and by absence of any suit in which the United States has consented to be sue (Ibid.).

## CONCLUSION

For the above reasons, the judgment of the district court is correct and should be affirmed.

Respectfully submitted,

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AUGUST 1966

## CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of
s brief, I have examined Rules 18 and 19 of the United States
:t of Appeals for the Ninth Circuit and that, in my opinion,
foregoing brief is in full compliance with those rules.

A. DONALD MILEUR
Attorney, Department of Justice
Washington, D. C., 20530

## APPENDIX

In reply refer to:
6.05c
Sacramento 075330

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 10, 1963

DECISION

| | | |
|---|---|---|
| Southport Land and Commercial Company | : | Request for equitable adjudication of California Coal Cash Entry No. |

Request Denied

The Southport Land and Commercial Company, hereinafter referred to as Southport, successor in interest of the Black Diamond Coal Mining Company, hereinafter referred to as Black Diamond, has filed a request for an equitable adjudication that it is, by virtue of Coal Entry No. 13, entitled to a patent for the N½ Sec. 8, T. 1 N., R. 1 E., M.D.M., in Contra Costa County, Califor

The history of the N½ of Section 8 is thoroughly discussed in a Mineral Repo prepared as a result of Southport's request for equitable adjudication. This report states, among other things, that coal was discovered and mined in the area as early as 1855, but that no formal claim was made for this tract until 1860, when the Cumberland Coal Company was formed by Francis L. Such and others to mine coal in Section 8. In June 1860 Mr. Such located the NW¼ of Section 8 for coal under a California law dated April 20, 1852.1/ In July 1860, a Mr. Noah Norton located the NE¼ of Section 8 under the same law. According to the Mineral Report, a title search revealed that Southport's claim to the land stems from these two claims.2/

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1/ The validity of this law was challenged and it is no longer effective according to the report.

2/ The Report states that the chain of title from 1860 to 1867, when Black Diamond acquired its interest in the land, is not complete. It states that there are many quit claim deeds for a part interest in the land from persons who were not previously found in the chain of title, and, in many instances, there are no deeds from persons who were in the chain of title to Black Diam

report continues that on May 13, 1865, Frank Bernard, as an officer of ck Diamond, filed an application with the State of California to have N½ of Section 8 located and sold as lieu lands under the provisions of tate law of April 27, 1863.3/ Location was made on June 30, 1865, for use of Bernard which was approved by the State Surveyor General on ıst 11, 1865. The application was never perfected, however, as Bernard ıed to pay for the land.

August 23, 1868, one John Mullan made application to the State Surveyor ·al for the purchase of the N½ of Section 8, under the same law that ıard had made his application. The application was accepted, and, on 21, 1869, a Certificate of Purchase was delivered to Mullan.

sequently, a suit was brought by Mullan and his partner, Avery, to evict :k Diamond from the land and, still later, a separate damage suit was ıght by Mullan and Avery for damages for the coal Black Diamond had mined ı the land. As a result, Black Diamond sought, through the Attorney General's .ce, to have the State selection set aside. The matter was ultimately .ded in favor of Black Diamond by the Supreme Court of the United States.4/ Court held that coal lands are mineral lands within the meaning of that n as used in the statutes regulating the disposition of the public domain hat the State of California could not, under the provisions of Section 7 he act of March 3, 1853 (10 Stat. 244), select coal lands. It held that selection and listing of known coal lands could be set aside in a suit equity brought by the United States, which would vacate the title of the e and of those claiming under it.

a Coal Entry No. 13 was filed by Black Diamond, under Sections 2347 through Revised Statutes (30 U.S.C.A. 71 et seq.), on April 25, 1883, at which $3,200, $10 per acre for the 320 tract, was submitted. The application rejected and cancelled by the Commissioner of the General Land Office on 7, 1883, because the Mullan case, supra, was still pending before the reme Court. Subsequently, in a letter dated July 8, 1886, the Assistant missioner of the General Land Office informed the Register and Receiver San Francisco that Black Diamond should be allowed to make entry "upon er application and showing compliance with the laws regulating the sale oal lands and the regulations established thereunder." (Emphasis added.) old the Register and Receiver that the purchase price of the land would 20 per acre, not $10, because the land was within 15 miles of a completed road, but that this amount would have to be paid in full by Black Diamond

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The law was titled "An act to provide for the sale of certain lands nging to the State," and was issued under the authority of the act of h 3, 1853 (10 Stat. 244), which provides for in lieu selections of public s by States.

as a credit could not be allowed for the $3,200 previously submitted. He stated that Black Diamond could make application for a repayment of the $3,200 previously submitted.5/ He also told the Register and Receiver that Black Diamond would have to file a certified list of its stockholders showing the capacity of each to enter the land. Black Diamond did not, however, file another application, request that its application of April 25, 1883, be recognized, or take any other action toward the perfection of the entry within the one year period prescribed by law.6/

The Mineral Report states that in 1887 the N½ of Section 8 was sold to the State of California for delinquent taxes for the years 1886 and 1887. In 1890 the Southport Land and Commercial Company was formed as a subsidiary of Black Diamond. Shortly after its organization, Southport bought from Black Diamond the N½ of Section 8 and other lands, obtaining a quit claim deed from Black Diamond for the lands. Later, in June 1900, Southport redeemed the N½ of Section 8.

In 1959 Black Diamond absorbed its subsidiary and adopted its name.

Southport and its predecessor, Black Diamond, were in undisputed possession of the land from at least 1886 to 1961, except for the short time it was sold to the State for delinquent taxes, and have paid all local tax assessments since 1900. Officers of Southport have stated that their Company was under the impression that a patent had been issued for the N½ of Section 8 years ago, and that they did not know it was public land until told so by the Shell Oil Company in 1961.

Southport now seeks an equitable adjudication that it is entitled to a patent to the N½ of Section 8 pursuant to the provisions of 43 U.S.C. 1161 through 1163, and the pertinent regulations issued by the Department of the Interior, 43 CFR Part 107. 7/

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5/ There is no record that a refund was either requested or made.

6/ The law reads, in part, as follows:

> "* * * all persons claiming under section 72 of this title shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant." (30 U.S.C.A. 74).

7/ 43 U.S.C. 1161 provides:

> "The Secretary of the Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended entries of public lands and

Leasing Act of February 25, 1920 (41 Stat. 437; ~~43~~ 30 U.S.C.A. 181 et seq.) prizes the disposition of certain classes of mineral lands of the United es, including coal lands, by the Secretary of the Interior only by lease. er the Leasing Act, coal lands of the United States were subject to dis- tion by the Secretary only by lease 'except [under section 37] as to l claims existent at date of the passage of this Act and thereafter tained in compliance with the laws under which initiated, which claims be perfected under such laws, including discovery.'" Work v. Braffet, U.S. 560, 564 (1928).

he instant case, it is our opinion that Coal Cash Entry No. 13 was not lid claim existent at the date of the Leasing Act of February 25, 1920, a, as it had been cancelled outright by the Commissioner of the General Office on May 7, 1883, and never thereafter perfected. The Secretary he Interior is, therefore, precluded by the Leasing Act from reinstating giving favorable consideration to the Entry. Section 37 of the Act ains the only exception to its operation as wholly superseding the opera- of the prior law.8/

ditional point is worthy of note here. The Mineral Report states that 886 most, if not all, of the coal had been mined from the N½ of Section 8. ming this to be so, even at the time Black Diamond was invited to submit pplication for entry under the coal laws the land was no longer valuable such deposits.9/ Thus, the claim could not have been perfected in com- ance with the coal laws.

rdingly, Southport's request for a patent to the N½ Sec. 8, T. 1 N., R. , M.D.M. is denied.

decision is the final administrative determination in this matter.

Charles H. Stoddard
Director

pved: January 15, 1964
Edward Cranfill
sistant Secretary of the Interior

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t should be noted that Section 2 of the Leasing Act authorizes the etary of the Interior to recognize and consider the equitable rights hose who have, in good faith, improved and occupied or claimed coal s, but only in connection with the issuance of coal leases.

o be subject to disposition under the coal land laws, lands had to ain 'workable' deposits; that is, coal in such quantity and of such ity as would warrant a prudent coal miner or operator in the expendi- and labor incident to the opening and operation of a coal mine or on a commercial basis." Samuel D. Pulford et al., 45 L.D. 404, 409